IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
S.B. Criminal Appeal No.508/2004

1. Ram Kishan S/o Pokar Ram
2. Rohtash @ Pappu S/o Pokar ram
3. Smt. Savita W/o Babu Lal

Versus

The State of Rajasthan

Date of Judgment :::: 8th May, 2007

PRESENT
Hon'ble Mr. Justice Narendra Kumar Jain

Shri A.K. Gupta, with Shri Rinesh Gupta and
Shri J.R. Bijrania, Counsel for accused-appellants
Shri V.S. Yadav, Counsel for complainant.
Shri Arun Sharma,P.P., for the State

//Reportable//

By the Court:-

This appeal, on behalf of three accused-persons, namely, (1) Ram Kishan S/o Pokar Ram, (2) Rohtash @ Pappu S/o Pokar Ram, and (3) Smt. Savita W/o Babu Lal, is directed against the impugned judgment and order dated 19.4.2004, passed by the Additional Sessions Judge (Fast Track), Behror, District Alwar, in Sessions Case No.82/2003 (46/2003), whereby the learned trial court, while acquitting accused-appellants from the offence under Section 302/34, IPC, and appellant Ram Kishan from the offence under Section 4/25 of the Arms Act, convicted and sentenced the appellants under Section 304/34, IPC, to undergo

10 years rigorous imprisonment and a fine of Rs.2,000/- each; in default of payment of fine, each of the accused to further undergo three months additional simple imprisonment.

Briefly stated, the facts of the appeal are that on 3.7.2003 PW-13 Prakash Singh, the nephew of deceased Bhopal, lodged a written-report (Exhibit P-19) at Police Station Shahajahapur, wherein it was mentioned that on 2.7.2003, at about 10-11 PM Savita W/o Babulal came at the residence of Bhopal S/o Bholuram; he was also present at his house. She told Bhopal to go with her as she wanted to ask him about her husband Babulal. Bhopal went with her. At about 12.00 in night, they heard that Bhopal was crying; upon hearing hue and cry, he, his mother Vimla, Rajbala W/o Bhopal and Mamta D/o Bhopal, went at the residence of Savita; they saw that Savita, Ram Kishan and Rohtash were inflicting injuries on the person of Bhopal by sickle ('dantli' – a sharp-edged-weapon), 'lathis' and kicks and fists. They intervened and stopped them from further beating to Bhopal. Thereafter they took Bhopal to hospital but, on the way itself, he died. On the basis of this information, FIR No.140/2003 (Exhibit P-20) was registered under Sections 323, 302/34, IPC.

After completion of investigation, the police filed a challan against all the three accused-persons.

The trial court framed charge against accused Rohtash and Savita under Section 302 read with Section 34, IPC, and against accused Ram Kishan under Section 302 read with Section 34, IPC, and under Section 4/25 of the Arms Act. The accused-persons denied the charge and claimed trial.

The prosecution examined 22 witnesses and produced documentary evidence Exhibit P-1 to Exhibit P-43 in support of the charge. Thereafter the statements of the accused-persons were recorded under Section 313, Cr.P.C. The accused Ram Kishan and Rohtash, both, stated that they were not present at the spot at the time of incident. They pleaded alibi in the case. Accused Savita stated that during the intervening night of 2nd and 3rd of July, 2003, she was sleeping in his house alone and at about 10-11 PM the deceased Bhopal entered in her house and tried to commit rape with her; she immediately cried; upon hearing her cry, number of persons came and inflicted injuries on the person of Bhopal Singh. In defence, the statement of DW-1 Kanwar Singh was recorded and documentary evidence Exhibit D-1 to Exhibit D-6 was produced.

The learned trial court, after considering the evidence on the record, recorded a finding that deceased Bhopal Singh went at the house of Savita in

night and committed criminal trespass and relying upon the statement of Smt. Savita recorded under Section 313, Cr.P.C., held that accused-persons had a right of private defence of person, but they exceeded their right of private defence, therefore, it was a case of culpable homicide not amounting to murder and consequently acquitted the accused-appellants from the charge under Section 302/34, IPC, as well as 4/25 of the Arms Act, but convicted and sentenced the accused-appellants under Section 304/34, IPC, as mentioned above.

The learned counsel for the accused-appellants contended that the learned trial court itself has recorded a finding that accused-persons had a right of private defence of person and further that the said right of private defence of the appellant was upheld by the Division Bench of this Court while dismissing D.B. Criminal Revision Petition No.453/2004, filed by the complainant Prakash Singh against the order of acquittal of the accused-persons from the charge under Section 302 read with Section 34, IPC, and under Section 4/25 of the Arms Act, vide order dated 8.4.2005; the only point for determination in the present appeal is whether the learned trial court was justified in convicting the accused-appellants by holding that they exceeded their right of private defence and further whether accused-appellants could

have been convicted under Section 304 with the aid of Section 34, IPC, in the facts and circumstances of the present case. He contended that according to Section 100 of the IPC, the appellant had a right of private defence even upto death of Bhopal Singh and present case cannot be said to be a case of exceeding the right of private defence. He specifically referred clause (3) of Section 100 and contended that even an assault with the intention of committing rape is sufficient to the voluntary causing of death of the assailant in the right of private defence of body. He further contended that in any circumstance the appellants could not have been convicted with the aid of Section 34, IPC, particularly when they were given the benefit of right of private defence of person and on the pretext that they exceeded their right of private defence. He, therefore, contended that the impugned judgment of the learned trial court is liable to be set-aside and the accused-appellants are liable to be acquitted.

The learned counsel for the complainant as well as the learned Public Prosecutor defended the impugned judgment passed by the trial court and contended that looking to number and nature of injuries sustained by deceased Bhopal Singh it is clear that accused-persons exceeded their right of private defence. They contended that although the

learned trial court has recorded a finding about private defence in favour of accused-persons, but the right of private defence under Section 100, IPC, is subject to the restrictions mentioned in Section 99 of the IPC. It is contended that even as per the case of accused-party, the deceased was not armed with any weapon, but he was in drunken condition and even if he committed criminal trespass then the necessary injuries could have been inflicted on his person so as to take him in custody and to handover him to police for necessary action against him according to law. But, the postmortem -report shows the multiple injuries, including stabbed wounds and fracture, were sustained by the deceased and accused-persons were three, in number; and accused Savita herself did not use the force to cause voluntarily death of the assailant, therefore, there was no occasion for the other accused-persons to cause voluntarily death of the assailant, but they could have, at the most, inflicted such injuries so as to caught hold him and handover him to the police.

It is further contended that right of private defence was available subject to restrictions, as contained in Section 99, therefore, the learned trial court has not committed any error in convicting the accused-appellants in the facts and circumstances of the present case. Therefore, they contended that there

is no merit in this appeal and the same is liable to be dismissed by this Court.

I have considered the submissions of learned counsel for the parties and minutely scanned the impugned judgment as well as the record of the trial court.

Before considering the submissions of learned counsel for the parties as well as the evidence of the case, it would be appropriate to discuss the relevant provisions of law as well as the case laws on the point.

Sections 96 to 106, IPC, deal with the right of private defence. Sections 97, 99 and 100, IPC, are reproduced as under:-

> "**97. Right of private defence of the body and of property**.- Every person has a right, subject to the restrictions contained in section 99, to defend-
>
> First.- His own body, and the body of any other person, against any offence affecting the human body;
>
> Secondly.- The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass."

> "**99. Acts against which there is no right of private defence**.- There is no right of private defence against an act which does not

reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act, may not be strictly justifiable by law.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Extent to which the right may be exercised.- The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence."

"**100. When the right of private defence of the body extends to causing death**.- The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereafter enumerated, namely:-

First.- Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly.- Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly.- An assault with the intention of committing rape;

Fourthly.- An assault with the intention of

gratifying unnatural lust;

Fifthly.- An assault with the intention of kidnapping or abducting;

Sixthly.- An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release."

Exception 2 of Section 300, IPC, is also reproduced as under:-

> "**Exception 2**.- Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence."

Section 105 of the Evidence Act is also necessary to be considered for adjudication of the present matter, which reads as under:-

> "**105. Burden of proving that case of accused comes within exceptions**.- When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, (45 of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

The above quoted provisions of law make it clear that every person has a right to defend his own

body, and the body of any other person, against any offence affecting the human body, under Section 97 of the IPC, but that right is subject to the restrictions contained in Section 99.

According to Section 100 the right of private defence of body extends to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions, as enumerated in six categories as reproduced above, but they are subjected to the restrictions mentioned in the last preceding section i.e. Section 99.

According to Section 99, there is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act, may not be strictly justifiable by law. It further provides that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. The right of private defence in no case extends to the inflicting of more harm then it is necessary to inflict for the purpose of defence.

In State of Orissa v. Nirupama Panda - (1989 Cri.L.J. 621), the Division Bench of Orissa High Court dismissed the appeal of the State of Orissa and upheld

the order of acquittal passed by the trial court giving the benefit of right of private defence. The accused had stabbed deceased person as he outraged her modesty. Para 8,9 and 10 of the judgment are reproduced as under:-

> "8. Along with the evidence of dying declaration it is necessary to consider the statements made by the respondent before P.W.10. For this purpose, it is necessary to make a further reference to his evidence where he stated that after hearing from the deceased about the cause of the chest wound, the witness found the respondent standing on the verandah of Bansidhar Das and enquired from her. The respondent told him that she stabbed the deceased, because he outraged her modesty (Atyachar). The above statement of the respondent was inculpatory in part and exculpatory in the other part. But considered as a whole, it did not tantamount to an extra-judicial confession for the reason that she had justified her action of stabbing the deceased in exercise of her right of private defence. Even if the statement is received as a piece of extra-judicial confession because of its inculpatory part, yet on the basis thereof and on consideration of the exculpatory part, it cannot be used as an incriminating piece of evidence against her, because she had every right to save her honour even by causing the death of the person who either committed rape on her or attempted to commit the same. The above being the position, the statement made by the respondent on the query of P.W.10 instead of supporting the prosecution actually worked as a defence which was quite acceptable.
>
> 9. Now coming to the judicial confession (Ext.15), the respondent stated that she was having her siesta in a room of the house of Bansidhar Das. The deceased came there and attempted to commit rape on her. As she shouted, the

deceased put cloth inside her mouth and by application of force committed rape on her. At that time in order to save her honour, she stabbed the deceased by means of a knife. After assault, the deceased was injured and so he left her and ran away. The confessional statement has to be accepted as a whole. Once it is done, it supports the defence version and not the prosecution case. The learned Standing Counsel drew our attention to the slightly different statements made by the respondent before P.W.10, the confessional statement (Ext.15), and in her examination under S.313, Cr.P.C. In the last statement (under S.313, Cr.P.C.) the respondent told a slightly different story of the deceased attempting to throttle her, when in order to save her from his clutches and in exercise of her right of private defence, she picked up a knife and gave a stab on the chest of her assailant. Despite the fact that she made a slightly different statement at the last leg of the trial, yet the substratum of the defence case remains unaltered, which is, the deceased attacked her chastity and in order to save her honour she had to use the knife in exercise of her right of private defence. We did not, therefore, find any discrepancy worth the name in the defence version.

10. The evidence of P.W.4 discloses that the respondent was married, but after her widowhood she led an immoral life by living as a mistress of Bansidhar Das. Even though for the sake of argument it is accepted that she was the mistress of Bansidhar Das, yet she was within her rights to save her honour from a rapist. Even a whore is entitled under law to protect herself from attacks of an intending rapist. Therefore, immoral character of the respondent, even if it is true, is of little consequence."

In Prakash Chandra and Others v. The State of Rajasthan - (1991 Cri.L.J. 2566), the Division Bench of this Court held as under:-

"17. Despite the fact that we have arrived at the finding that the prosecution witnesses are not reliable and the prosecution has not travelled the entire distance between 'may be true' and 'must be true' by unimpeachable reliable and cogent evidence, yet we have to look into the case from a different angle, particularly because the accused Prakash Chandra and Mst. Kamla alias Jamna have admitted that Girwar Singh has been killed by Prakash Chandra and the other members of the complainant party had also sustained injuries at the hands of the accused persons. Looking from this angle also we are unable to hold the accused appellants guilty as in our opinion they were entitled to exercise the right of private defence. Complainants going at that odd hour of the night to the residence of Prakash Chandra, dragging a young lady of 25 years with ulterior motives, and causing injuries on her person were sufficient circumstances for the accused to have taken law in their own hands. Section 100, IPC extends the right of private defence of the body to voluntary causing of death or any other harm to the assailant for the offence which occasions the exercise of right be of the following description:-

"That the assailant was with the intention of committing rape and/or with intention of kidnapping or abducting."

Dragging out of Mst. Jamna alias Kamla from her house by force at 9.00 p.m. with an intention to seduce her to sexual intercourse would certainly be a circumstances which gave a right to the accused persons to inflict injuries on the person of the deceased, Dhan Singh and Shambhu Singh. It was clearly a case of atrocity on weaker sex of the society. She was assaulted by the

> deceased and the complainant party who had an evil eye on her, since they had been passing unwarranted remarks on her virtually outraging her modesty, and in these circumstances accused knowing the background were justified in coming to the rescue of the young lady and in that process to take up the arms. Considering the totality of the circumstances from any angle we are of the opinion that this is a fit case where the accused must be extended the benefit of doubt may be because we are unable to rely the prosecution story or because of the fact that they all were entitled to the benefit of exercising of right of private defence of the person of Mst. Kamla alias Jamna."

In Badan Nath v. State of Rajasthan – (1999 Cri.L.J. 2268), the Division Bench of this Court, in the facts and circumstances of that case, extended the benefit of Section 100 of the IPC in favour of the accused therein.

In Mohd. Ramzani v. State of Delhi – (AIR 1980 SC 1341), their Lordships of the Hon'ble Supreme Court held as under:-

> "19. It is trite that the onus which rests on an accused person under Section 105, Evidence Act, to establish his plea of private defence is not as onerous as the unshifting burden which lies on the prosecution to establish every ingredient of the offence with which the accused is charged beyond reasonable doubt. It is further well established that a person faced with imminent peril of life and limb of himself or another, is not expected to weigh in 'golden scales' the precise force needed to

repel the danger. Even if he at the heat of the moment carries his defence a little further then what would be necessary when calculated with precision and exactitude by a calm and unruffled mind, the law makes due allowance for it. Viewed in the light of these principles, the defence, in the instant case had succeeded in establishing with a balance of probability, that the deceased and Abdul Rashid armed with a Saria and knife respectively, first assaulted Mohd. Shafi and thereupon the appellant assaulted the deceased to save his father and himself from further injuries. Even if it be assumed for the sake of argument that the material on record fell short of discharging the nature of onus on the appellant under Section 105, Evidence Act, on account of the non-production of the Doctor who examined Mohd. Shafi and the appellant, and prepared the medico-legal reports Ex.PW.15/A and Ex.PW.15/DY, then also the benefit of that deficiency and the doubt arising therefrom, could not be given to the prosecution. The prosecution case as propounded by its star witness Abdul Rashid was that both the father (Mohd. Shafi) and the son (appellant) actually participated in the assault on the deceased. To support that story, the prosecution went to the length of 'planting' the deceased's blood on the clothes of Mohd. Shafi. When this substratum of the story viz. Mohd. Shafi holding the deceased at the time of the fatal assault, was found to be false and no satisfactory explanation was coming forth from the prosecution about the injuries of Mohd. Shafi and the appellant, the only prudent course in the ultimate analysis, for the Court was to hold that the prosecution had failed to discharge its burden of bringing home the guilt to the appellant beyond reasonable doubt."

In Yogendra Moraji v. The State of Gujarat -

(AIR 1980 SC 660), the Hon'ble Supreme Court considered the provisions relating to right of private defence and laid down certain general principles embodied in the Penal Code governing the exercise of right of private defence. Para 13 of the judgment reads as under:-

> "13. The Code excepts from the operation of its penal clauses large classes of acts done in good faith for the purpose of repelling unlawful aggression but this right has been regulated and circumscribed by several principles and limitations. The most salient of them concerned the defence of body are as under: Firstly, there is no right of private defence against an act which is not in itself an offence under the Code; Secondly, the right commences as soon as – and not before – a reasonable apprehension of danger to the body arises from an attempt or threat to commit some offence although the offence may not have been committed and it is conterminous with the duration of such apprehension (Section 102). That is to say, right avails only against a danger imminent, present and real; Thirdly, it is a defensive and not a punitive or retributive right. Consequently, in no case the right extends to the inflicting of more harm than it is necessary to inflict for the purpose of the defence. (Sec.99). In other words, the injury which is inflicted by the person exercising the right should be commensurate with the injury with which he is threatened. At the same time, it is difficult to expect from a person exercising this right in good faith, to weigh "with golden scales" what maximum amount of force is necessary to keep within the right. Every reasonable allowance should be made for the bona-fide defender "if he with the instinct of

self-preservation strong upon him, pursues his defence a little further than may be strictly necessary in the circumstances to avert the attack." It would be wholly unrealistic to expect of a person under assault, to modulate his defence step by step according to the attack; Fourthly, the right extends to the killing of the actual or potential assailant when there is a reasonable and imminent apprehension of the atrocious crimes enumerated in the six clauses of Section 100. For our purpose, only the first two clauses of Section 100 are relevant. The combined effect of these two clauses is that taking the life of the assailant would be justified on the plea of private defence; if the assault causes reasonable apprehension of death or grievous hurt to the person exercising the right. In other words, a person who is in imminent and reasonable danger of losing his life or limb may in the exercise of right of self-defence inflict any harm, even extending to death on his assailant either when the assault is attempted or directly threatened. This principle is also subject to the preceding rule that the harm or death inflicted to avert the danger is not substantially disproportionate to and incommensurate with the quality and character of the perilous act or threat intended to be repelled; Fifthly, there must be no safe or reasonable mode of escape by retreat, for the person confronted with an impending peril to life or of grave bodily harm, except by inflicting death on the assailant; Sixthly; the right being, in essence, a defensive right, does not accrue and avail where there is "time to have recourse to the protection of the public authorities." (Sec.99).

In Guriya Bucha v. State of Gujarat, - (AIR

1962 Gujarat 39), the Division Bench of the Gujarat High Court, in the facts and circumstances of that case, considered the Exceptions of Section 300, and the provisions of Sections 99 and 100 of the IPC, and held as under:-

> "(9) As regards the circumstances, in which the offence seems to have been committed, in his examination at the Sessions trial the appellant has stated as follows:-
>
> "We both were sleeping a little away from each other. The deceased removed my Langoti and sat over me. I asked him not to do such a thing. He then gave me a stick blow. I lost my balance of mind. I do not know what happened thereafter. I ran away."
>
> It is, therefore, contended that the deceased was attempting to commit an unnatural offence on the appellant, and that Exception 1 to Sec.300, Indian Penal Code, would apply to the facts of the instant case. It is also a fact that there was no enmity between the deceased and the appellant and both had gone to the field, to graze their cattle. They were, therefore, admittedly on good terms. According to the prosecution, the quarrel arose out of a controversy as to who should bring all the cattle at one place. Ordinarily it is very unlikely that on such grounds a serious injury would be inflicted on the deceased. There were nine arrow injuries on the deceased, and three of them were each sufficient in the ordinary course of nature to cause death. It is, therefore, contended that the incident must have happened as a result of the attempt on the part of the deceased to commit an unnatural offence on the appellant. If it is a case of an assault with the intention of gratifying unnatural lust, the

> right of private defence of the body would arise under S.100, Indian Penal Code, and would extend, under the restrictions mentioned in Sec.99, Indian Penal Code, to the voluntary causing of death or of any other harm to the assailant. One of the restrictions mentioned in Sec.99, Indian Penal Code, is that the right of private defence does not extend to the inflicting of more harm than it is necessary to inflict for the purpose of defence. In the instant case, however, three fatal injuries were inflicted on the deceased, and it cannot be said that there was any right of private defence to inflict all the fatal injuries. The right of private defence, if any, assuming for a moment, the defence version to be true, would have come to an end after the infliction of the first injury sufficient in the ordinary course of nature to cause death. After Bhikhala had been disabled, there would not remain any further right of private defence, and the injuries inflicted thereafter would not be saved by any right of private defence. In view of the fact that there were three injuries each of which was sufficient in the ordinary course of nature to cause death, the appellant would be guilty under S.302, Indian Penal Code, for having caused the death of the deceased Bhikhala by inflicting the second and third of these injuries."

In Kashi Ram v. State of M.P. - (AIR 2001 SC 2902), considered the provisions of Sections 99, 100, 148, 149, especially Exception 2 to Section 300, and Section 304 Part II of the IPC and Section 105 of the Evidence Act, and held that plea of self-defence cannot be denied to accused persons on ground that plea was not specifically taken by accused persons in

their statements under Section 313 Cr.P.C. and because injured accused did not enter in witness box. Further that so long as the accused persons were acting in exercise of right of private defence, their object was not unlawful and so there was no unlawful assembly but once they exceeded the right, the assembly ceased to be lawful and became an unlawful assembly. There too only such of the members of the assembly who shared the object of doing anything in excess of the exercise of right of private defence, alone would be liable to be punished for the acts committed in prosecution of the common object or for their individual unlawful acts. Para 24 and 30 of the judgment are reproduced as under:-

> "24. The High Court was also not right in criticising and discarding availability of plea of self defence to the accused persons on the ground that the plea was not specifically taken by the accused in their statements under Section 313, Cr.P.C. and because the accused Prabhu did not enter in the witness box. Though Section 105 of the Evidence Act enacts a rule regarding burden of proof but it does not follow therefrom that the plea of private defence should be specifically taken and if not taken shall not be available to be considered though made out from the evidence available in the case. A plea of self defence can be taken by introducing such plea in the cross-examination of prosecution witnesses or in the statement of the accused persons recorded under Section 313, Cr.P.C. or by adducing defence evidence. And, even if the plea is not introduced in

any one of these three modes still it can be raised during the course of submissions by relying on the probabilities and circumstances obtaining in the case as held by this Court in Vijayee Singh's case (supra). It is basic criminal jurisprudence that an accused cannot be compelled to be examined at a witness and no adverse inference can be drawn against the defence merely because an accused person has chosen to abstain from the witness box.

.....

.....

30. Could any of the accused persons have been held guilty of any offence for causing hurt with the aid of Section 149 IPC? We have already held that the accused persons had right of private defence of person of accused Prabhu available to them. The right of private defence need not necessarily be exercised for the defence of one's own person; it can be exercised for the defence of the person of another one. So long as an assembly of persons is acting in exercise of the right of private defence it cannot be an unlawful assembly. An assembly though lawful to begin with may in the course of events become unlawful. So long as the accused persons were acting in exercise of right of private defence, there object was not unlawful and so there was no unlawful assembly but once they exceeded the right, the assembly ceased to be lawful and became an unlawful assembly. There too only such of the members of the assembly who shared the object of doing anything in excess of the exercise of right of private defence, alone would be liable to be punished for the acts committed in prosecution of the common object or for their individual unlawful acts. The assemblage of accused persons, five or more in number, cannot wholly be held liable to conviction with the aid of Section 149 IPC unless the whole assembly shared the common

> object of doing anything in excess of the exercise of the right of private defence. In the case at hand, the High Court has not arrived at a finding that any of the injuries other than the one inflicted by Ramesh were so inflicted after the members of the complainant party had taken to their heels and yet Ramesh fired at them. If they had caused any injury before the members of the prosecution party had turned their back and started running away from the scene of occurrence, there was no unlawful assembly and none could have been convicted either under Section 148 or with the aid of Section 149, IPC. There is no finding arrived at by the High Court and there is no positive evidence available on record to hold, that any accused (other than Ramesh, as to whom we are dealing just hereinafter) caused any injury to anyone after the right of private defence had ceased to be available."

The above referred relevant provisions of law and case laws, on the point, make it clear that every person has a right of private defence in respect of his own body and body of any other person and the right of private defence of the body extends to the voluntarily causing of death or of any other harm to the assailant, if the offence which occasions the exercise of right be of any of the descriptions such an assault as may reasonably cause the apprehension that death will otherwise be consequence of such assault; such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault; an assault with intention

of committing rape; an assault with the intention of gratifying unnatural lust; an assault with the intention of kidnapping or abducting; an assault with the intention of wrongfully confining a person, apprehending a person under the circumstances which may reasonably cause him that he will be unable to have recourse to the public authorities for his release.

However, the above right of private defence of the body and of property, which may extend to voluntarily causing of death or of any other harm to the assailant, is subject to restrictions as contained in Section 99 of the IPC, which includes that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities and further that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

The right of private defence need not necessarily be exercised for the defence of one's own person; it can be exercised for the defence of the person of another one; so long as an assembly of persons is acting in exercise of the right of private defence, it cannot be an unlawful assembly. As assembly though lawful to begin with may in the course of events become unlawful, and once the right of

private defence is exceeded, the assembly ceased to be lawful and becomes an unlawful assembly. But, thereafter an individual act of a person has to be taken into consideration. Though, in Section 105 of the Evidence Act enacts a rule regarding burden of proof but it does not follow therefrom that the plea of private defence should be specifically taken and if not taken shall not be available to be considered though made out from the evidence available in the case. A plea of self-defence can be taken by introducing such plea in the cross-examination of prosecution witnesses or in the statement of the accused-persons recorded under Section 313, Cr.P.C., or by adducing defence evidence; and, even if the plea is not introduced in any one of these three modes, still it can be raised during the course of submissions by relying on the probabilities and circumstances obtaining in the case.

Now, I come to the finding of the trial court in the present case and the evidence available on the record.

The trial court, after considering the evidence on the record, has recorded a finding that deceased Bhopal committed criminal trespass in the house of accused Savita in night, therefore, accused-persons had a right of private defence of person, but they exceeded their right of private defence of person and,

thereby committed offence of culpable homicide not amounting to murder. The trial court acquitted the accused-persons from the charge under Section 302/34, IPC. It is relevant to mention that complainant Prakash Singh filed D.B. Criminal Revision Petition No.453/2004 before this Court challenging the order of acquittal of the accused-persons from the charge under Section 302/34, IPC, and the learned Division Bench of this Court, while rejecting the revision petition of the complainant, observed that as under

> ".....We find no infirmity whatsoever in the finding of the learned trial Judge that the deceased Bhopal Singh had himself gone to the house of Savita at 11.00 O'clock in the night when her husband was not in the house. We also find the finding of the learned trial Judge to be correct that Bhopal Singh had not gone to the house of Savita with innocent intention. If, therefore, from the prosecution evidence as also defence evidence produced by the accused, a correct finding has been recorded that Bhopal Singh was caused injuries by the accused on an alarm made by Savita being a victim of outraging her modesty;....."

Therefore, it is clear that right of private defence of person was available to the accused-persons. The question before this court for adjudication is only whether they exceeded their right of private defence, or not, in the facts and

circumstances of the present case.

There are four eye-witnesses examined on behalf of the prosecution in the present case. PW-10 Mamta, PW-11 Vimla, PW-13 Prakash Singh and PW-18 Rajbala. Although, they are relatives of the deceased but only on this ground their testimony cannot be discarded, however, their testimony has to be scrutinized with cautious.

In the written-report (Exhibit P-19) it is mentioned that Ram Kishan was armed with sickle ('dantli'). The above witnesses have stated that when they reached at the house of Savita, they saw all the three accused persons inflicting injuries on the person of deceased Bhopal Singh; Ram Kishan was armed with sharp edged weapon i.e. 'dantli'; Rohtash was armed with 'lathi' and Savita was armed with 'juda' (a wooden instrument applied on a camel – like a stick). Bhopal Singh had fallen on the floor and thereafter also they continued inflicting injuries on his person. As per postmortem-report (Exhibit P-18) the deceased sustained following injuries:-

> "(1) Bruise 12x18 cm on left thigh anterior & laterals;
>
> (2) Bruise on left lower leg extending from knee to ankle;
>
> (3)Bruise on right thigh all around;
>
> (4) Bruise on right lower leg present all around;

(5) Five stab incised wounds of different sizes varying from 3 cm x 0.5 cm x bone deep to 4 cm x 1 cm x bone deep in different directions present on left lower leg situated at a distance of 8-10 cm from knee to ankle lateral surface;

(6) Eleven stab incised wound of varying sizes varying from 3 cm x 10 cm x deep to muscle to 4 cm x 10 cm x deep to muscle present on right thigh laterally;

(7) Four stab incised wound different sizes varying from 3 cm x 0.7 cm x deep to muscle to 4 cm x 1 cm x deep to muscle on right lower leg situated at a distance of 8-10 cm;

(8) Three stab incised wound of size 2 x 0.5 cm x muscle deep on left arm laterally in lower 1/3 part;

(9) Four stab incised wounds of size 2 cm x 0.5 cm x bone deep on right fore arm laterally;

(10) Swelling differs ill-defined on left hand denial surface;

(11) Differs ill-defined swelling on right thigh in lower ½ part."

Injury No.5 shows that there were five stab incised wounds of different sizes varying from 3 cm x 0.5 cm x bone deep to 4 cm x 1 cm x bone deep in different directions present on left lower leg situated at a distance of 8-10 cm from knee to ankle lateral surface. Injury No.6 shows 11 stab incised wound of varying sizes varying from 3 cm x 10 cm x deep to muscle to 4 cm x 10 cm x deep to muscle present on right thigh laterally. Injury No.7 shows

four stabbed incised wounds. Injury No.8 shows three stabbed incised wounds. Injury No.9 shows four stabbed incised wounds. It appears that total 33 injuries were inflicted on the person of deceased including 27 stabbed incised wounds.

It is relevant to mention that Savita also sustained injury and her injury-report is Exhibit P-19, which shows that injury No.1 was consisted of two bruises of 0.5 x 0.5 cm on palm of right hand at back of little and ring finger and injury no.2 was pain in back and no visible injury seen.

PW-20 Dr. Vijaypal Singh has proved postmortem-report (Exhibit P-18). The cause of death was opined as excessive haemorrhage leading to coma and death. PW-20 Dr. Vijaypal Singh, in his cross-examination, stated that deceased died due to stabbed wounds.

The allegation against deceased was that he came in the house of Savita in night in a drunken condition, but the postmortem-report (Exhibit P-18) does not confirm about any liquor having taken by deceased; there is no allegation that deceased came armed with weapon. He came armless. Savita has not examined herself as defence witness. Although, it is not necessary for her to get herself examined in defence, but, if she would have been examined then the prosecution could have got an opportunity to cross-examine her. She has not stated as up-to what extent

her modesty was outraged by the deceased, and at what stage she shouted and other persons came in her rescue.

The accused Ram Kishan and Rohtash, both, have stated that they were not present at the place of incidence when the alleged occurrence took place and they have falsely been implicated in the present case. The plea of alibi and right of private defence both are contrary to each other and they cannot be claimed by accused simultaneously but by overwhelming evidence, the presence of accused at the place of incidence is proved and right of private defence is available to him then the same should not be denied only on the ground that at one point of time he denied his presence at the place of occurrence in view of observation of Hon'ble Supreme Court in the case of Gottipulla Venkata Siva Subbrayanam & Others v. The State of Andhra Pradesh & Another – AIR 1970 SC 1079. So far as present case is concerned, it is not necessary to discuss the plea of alibi of the appellant as the trial court has recorded a finding that they were entitled to a right of private defence. Therefore, it is presumed that they had a right of private defence of person; particularly when finding of the trial court in this regard has already been upheld by the Division Bench, while dismissing the Criminal Revision Petition filed by the complainant.

The accused Savita, in her statement recorded under Section 313, Cr.P.C., stated that during the intervening night of 2nd and 3rd July, 2003, she was sleeping in her house and at about 10-11 in the night deceased Bhopal committed criminal trespass by entering in her house and attempted to commit rape on her. She shouted and after hearing her hue and cry, the villagers came at the spot and beat-up deceased Bhopal Singh.

It is relevant to mention that as per the statement of Savita the number of villagers came at the spot whereas accused persons Ram Kishan and Rohtash, both, were her family members. Admittedly, three persons were there at the spot and, according to defence version, the deceased came armless and in a drunken condition. This is not a case where Savita was alone at the spot and she inflicted injuries resulting in death of deceased. It appears that there was fracture of knee of the deceased and he fell down, but still the accused continued inflicting injuries on his person. Three persons were sufficient to caught hold of the deceased and to handover him to police authorities for necessary action according to law. Their right of private defence was available only up-to the extent of their coming in rescue of Savita and saving her from outraging her modesty by the hands of deceased, who was armless. They could have easily

caught hold of him after inflicting certain injuries, but, despite the accused fell down, the accused continued inflicting injuries on his person. The postmortem-report shows 11 injuries, but, in fact, there are total 33 injuries including number of stabbed wounds. In these circumstances, I find that the learned trial court has rightly recorded a finding that accused-persons had a right of private defence of person, but they exceeded their right in the facts and circumstances of the present case.

Now, the question arises as to which of the accused exceeded the right of private defence, in the facts and circumstances of the present case.

PW-20 Dr. Vijaypal Singh stated that deceased died due to stabbed wounds. PW-10 Mamta has stated that Savita was armed with 'juda' (like a wooden-stick), Rohtash was armed with a 'lathi' and Ram Kishan with trident. PW-11 Vimla stated that Ram Kishan was having trident, Rohtash was armed with 'lathi' and Savita was armed with 'juda'. PW-13 Prakash Singh stated that Ram Kishan was armed with 'dantli' (sharp-edged-weapon), Rohtash was armed with 'lathi' and Savita was armed with 'juda' (wooden instrument used at camel). PW-18 Smt. Rajbala stated that Ram Kishan was armed with trident, Rohtash was armed with 'lathi' and Savita was armed with 'juda'. All the eye-witnesses said that Ram Kishan was armed

with sharp-edged-weapon, Rohtash was armed with 'lathi' and Savita was armed with 'juda'. Exhibit P-35, the recovery-memo of iron-trident ('trishul'), makes it clear that the trident was described by Investigating Officer as sharp-edged and pointed also.

Exception 2 of Section 300, IPC, provides that culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Postmortem-report (Exhibit P-18) shows that there were 27 stab incised wounds. The prosecution evidence shows that these injuries were caused on the person of deceased by accused Ram Kishan, who was armed with sharp-edged-weapon.

The Hon'ble Supreme Court in similar circumstances in Kashi Ram Vs. State of M.P. (Supra), convicted one accused Ramesh under Section 304-II, IPC, and acquitted other accused-persons. Therein their Lordships held that so long an assembly of persons as acting in exercise of the right of private defence it cannot be an unlawful assembly. An assembly though lawful to begin with may in the course of

events become unlawful. So long as the accused persons were acting in exercise of right of private defence, there object was not unlawful and so there was no unlawful assembly but once they exceeded the right, the assembly ceased to be lawful and became an unlawful assembly. There too only such of the members of the assembly who shared the object of doing anything in excess of the exercise of right of private defence, alone would be liable to be punished for the acts committed in prosecution of the common object or for their individual unlawful acts.

The Division Bench of this Court in Pehalwan & Others Vs. The State of Rajasthan – [1977 (2) R.Cr.C. 173] held that it should be remembered that in case the right of private defence has been exceeded it is only that accused who has exceeded that right can be held guilty and not the other accused. Once the right of private defence has been held to be established and the only criticism is that it has been exceeded then each individual accused can only be liable for the specific act and the applicability of sections 34 and 149 cannot be invoked by the prosecution.

The Hon'ble supreme Court in Vajrapu Sambayya Naidu & Others Vs. State of A.P. and Others – (2004) 10 SCC 152 held that it is well settled that in a case where the court comes to the conclusion that the

members of the defence party exceeded the right of private defence, the court must identify and punish only those who have exceeded the right. Section 34/149 IPC will not be applicable in the case of persons exercising their right of private defence. (See State of Bihar v. Nathu Pandey – (1969) 2 SCC 207).

In view of the above discussion, this Court is of the view that it was only accused Ram Kishan, who exceeded his right of private defence of person.

In these circumstances, the order of the trial court convicting accused Rohtash and Savita is liable to be set-aside, but its order convicting accused Ram Kishan is liable to be upheld.

The sentence of imprisonment awarded against accused-appellant Ram Kishan under Section 304 Part II, IPC, appears to be excessive, in the facts and circumstances of the present case, and, in my view, ends of justice will meet in case he is awarded with the sentence of 5 years rigorous imprisonment.

Consequently, the appeal of accused Rohtash @ Pappu and Smt. Savita is allowed; their order of conviction and sentence is set-aside; they are acquitted. Accused Smt. Savita is on bail and she needs not surrender. Her bail bonds are discharged. Accused Rohtash @ Pappu is in judicial custody and he may be set at liberty forthwith, if his custody is not required in any other case.

The conviction of accused Ram Kishan under Section 304 Part II, IPC, is upheld, but his sentence is reduced to a period of 5 years rigorous imprisonment and a fine of Rs.2,000/- (Rupees two thousand); in default of payment of fine, to further undergo one month's simple imprisonment.

(Narendra Kumar Jain), J.

//Jaiman//